

No. 12436

United States
Court of Appeals
For the Ninth Circuit.

PACIFIC MAGNESIUM, INC., (formerly Socal
Magnesium, Inc.),

Appellant,

vs.

HARRY C. WESTOVER, individually and as Col-
lector of Internal Revenue for the Sixth Dis-
trict of California,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California
Central Division.

FILED

FEB 2 - 1950

PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer of Defendant, Harry C. Westover, Collector of Internal Revenue for the Sixth Collection District of California	7
Certificate of Clerk	76
Complaint	2
Condensation of the Testimony of Ralph D. Sweeney	30
—direct	30
—examination by the court	34
—cross	34
Conditions of Cash Bond	36
Designation of Portions of Record on Appeal..	39
Exhibit, Defendant's:	
A—Claim for Refund, Statement and Cer- tificate	69
Exhibit, Plaintiff's:	
No. 1—Stipulation	40
Findings of Fact and Conclusions of Law	26
Conclusions of Law	27
Findings of Fact	26

INDEX	PAGE
Judgment	29
Names and Addresses of Attorneys	1
Notice of Appeal	35
Opinion	11
Order on Decision	25
Statement of Points Relied on	37
Statement of the Points on Which Appellant Intends to Rely and Designation of the Parts of the Record Necessary for the Considera- tion Thereof	78

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In the District Court of the United States for the
Southern District of California, Central Division

No. 8685-Y

PACIFIC MAGNESIUM, INC. (formerly So-Cal
Magnesium, Inc.),

Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as Col-
lector of Internal Revenue for the 6th District
of California,

Defendant.

COMPLAINT

(For the Recovery of Federal Income Tax)

The complaint of the plaintiff respectfully shows
to this Court and alleges:

I.

That at all the times herein mentioned, the plain-
tiff was and now is a corporation organized under
the laws of California, having its principal place
of business at 1201 El Vago, La Canada, California.
Its name formerly was So-Cal Magnesium, Inc.

II.

That at all the times herein mentioned the defend-
ant was, and now is, the duly appointed Collector
of Internal Revenue for the 6th District of Cali-
fornia.

III.

That on or about March 15, 1945, plaintiff duly filed with the defendant, the Collector of Internal Revenue for the 6th District of California, its income and excess profits tax returns for the calendar year 1944 in accordance with the Internal Revenue Code. Its excess profits tax return showed no tax due.

IV.

That on October 15, 1947, plaintiff received from the Commissioner of Internal Revenue, Washington, D. C., a letter issued under the provisions of Section 272 of the Internal Revenue Code, proposing a deficiency of \$36,352.39 in excess profits tax for the calendar year 1944, claimed to be due from plaintiff.

V.

On November 14, 1947, plaintiff paid to defendant, the Collector of Internal Revenue for the 6th District of California, the \$36,352.39 so demanded by the Commissioner of Internal Revenue, together with interest thereon, from March 15, 1945, at 6% per annum, amounting to \$5,816.38.

VI.

On March 12, 1948, plaintiff filed with the defendant, Collector of Internal Revenue for the 6th District of California, its claim for the refund of excess profits tax for the calendar year 1944 in the amount of \$30,487.39, plus interest paid thereon in the amount of \$4,877.98, plus statutory interest on

both of such amounts. The grounds for the claim were the same as are set forth in this complaint.

VII.

Neither the defendant nor the Commissioner of Internal Revenue, nor any one else, has refunded to plaintiff said \$30,487.39, and interest of \$4,877.98, or any other amount.

VIII.

Said claim for refund has been on file for six months and this suit is brought under the provisions of Section 3772 of the Internal Revenue Code.

IX.

This claim for refund has not been assigned by plaintiff to any one and is now the property of plaintiff.

X.

All of the outstanding capital stock of plaintiff, and all of the outstanding capital stock of So-Cal Foundry was owned, directly or indirectly, by P. H. Sheedy. P. H. Sheedy was president of both corporations and a director of both. So-Cal Foundry claimed that plaintiff owed So-Cal Foundry \$39,335.07.

XI.

One Frank Gaines was an officer of both of the above-named corporations, and wished to purchase the stock of So-Cal Foundry. On November 20, 1944, Messrs. Sheedy and Gaines entered into a contract under the terms of which Frank Gaines pur-

chased from P. H. Sheedy all of the stock of So-Cal Foundry and further agreed that Gaines would cause So-Cal Foundry to compromise and settle for \$4,000.00 the \$39,335.07 claim of So-Cal Foundry against plaintiff. The terms of said contract were carried out in 1944.

XII.

The Commissioner of Internal Revenue determined that the \$35,335.07 by which plaintiff reduced its debt constituted income to plaintiff, and that said \$35,335.07 was not includable in plaintiff's invested capital from November 20, 1944, either as ordinary invested capital or as new capital, as defined in Section 718(a)(2) and (a)(6) of the Internal Revenue Code.

XIII.

Plaintiff alleges that either (1) plaintiff paid to So-Cal Foundry all that it was able to pay and had no net worth after the settlement of November 20, 1944. and hence did not realize income from the settlement of the debt or (2) So-Cal Foundry intended to, and did, make a gift to plaintiff and consequently the settlement would not be income to plaintiff or (3) P. H. Sheedy, the principal stockholder of plaintiff made a contribution to plaintiff's capital which did not constitute income to plaintiff. If any of the above propositions is the correct solution, then plaintiff would have an increase in its invested capital as new invested capital as of November 20, 1944 in the amount of \$35,335.07 and would have an excess profits credit based thereon.

XIV.

Plaintiff's correct excess profits tax liability for the calendar year 1944 was \$5,865.00. It has paid to the defendant on account of this 1944 excess profits tax liability \$36,352.39. It has overpaid to the defendant its excess profits tax for the year 1944 in the amount of \$30,487.37, plus interest thereon of \$4,877.98.

XV.

That by reason of the premises defendant became, and is, indebted to plaintiff in the sum of \$35,365.35, plus statutory interest thereon from November 14, 1947.

Wherefore, plaintiff prays for judgment against defendant in the sum of \$35,365.35, plus interest thereon at 6% per annum from November 14, 1947, together with plaintiff's costs of suit, and such other relief as seems proper to the Court.

/s/ MELVIN D. WILSON,

/s/ JOSEPH D. PEELER,

Attorneys for the Plaintiff.

State of California,
County of Los Angeles—ss.

Thomas Sheedy, being first duly sworn, deposes and says that he is the Secretary of Pacific Magnesium, Inc.; that he has read the foregoing Complaint and knows the contents thereof; and that the

statements contained therein are true of his own knowledge.

/s/ THOMAS SHEEDY.

Subscribed and Sworn to before me this 18th day of September, 1948.

[Seal] /s/ JOHN EDWARD WEAVER,
Notary Public, in and for said County and State.

My Commission Expires April 6, 1951.

[Endorsed]: Filed September 23, 1948.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, HARRY C. WEST-
OVER, COLLECTOR OF INTERNAL REV-
ENUE FOR THE SIXTH COLLECTION
DISTRICT OF CALIFORNIA

Comes Now Defendant and for his answer to the Complaint of the plaintiff herein, admits, denies, and alleges:

I.

Admits the allegations contained in paragraph I of the Complaint.

II.

Admits the allegations contained in paragraph II of the Complaint.

III.

Denies the allegations contained in paragraph III of the Complaint, except that it is admitted that on March 15, 1945, plaintiff filed with the defendant its income and excess profits tax returns for the

calendar year 1944, and that its excess profits tax return showed no tax due.

IV.

Admits the allegations contained in paragraph IV of the Complaint. Alleges that on March 8, 1948, the Commissioner of Internal Revenue assessed excess profits taxes in the amount of \$36,352.39 with interest of \$6,493.13, or a total of \$42,845.52, for 1944.

V.

Denies the allegations contained in paragraph V of the Complaint, except that it is admitted that on November 14, 1947, plaintiff paid to defendant on account of the excess profits tax and interest for 1944, the sum of \$41,116.59. Alleges that on March 23, 1948, the sum of \$1,043.72 was credited on such tax and interest, leaving a balance unpaid of \$685.21.

VI.

Admits the allegations contained in paragraph VI of the Complaint, and denies the allegations contained in the claim for refund except to the extent that similar allegations in the Complaint are admitted in this Answer.

VII.

Admits the allegations contained in paragraph VII of the Complaint, but alleges that such tax and interest were credited with the amount of \$1,043.72 as alleged in paragraph V hereinabove.

VIII.

Admits the allegations contained in paragraph VIII of the Complaint.

IX.

Alleges that defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IX of the Complaint and on that ground denies the same.

X.

Alleges that defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph X of the Complaint and on that ground denies the same, except that it is admitted that the plaintiff represented to the Commissioner that the facts were as therein alleged.

XI.

Alleges that defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XI of the Complaint, and on that ground denies the same, except that it is admitted that the plaintiff represented to the Commissioner that the facts were as therein alleged.

XII.

Admits the allegations contained in *paragraph* of the Complaint.

XIII.

Denies the allegations contained in paragraph XIII of the Complaint.

XIV.

Denies the allegations contained in paragraph XIV of the Complaint, except that it is admitted that plaintiff paid to defendant on account of its excess profits tax liability for 1944 the sum of \$36,352.39.

XV.

Denies the allegations contained in paragraph XV of the Complaint.

Wherefore the Defendant demands judgment dismissing the action together with the costs and disbursements of the action.

Dated: This 21st day of April, 1949.

JAMES M. CARTER,

United States Attorney,

E. H. MITCHELL and

EDWARD D. McHALE,

Assistant U. S. Attorneys,

EUGENE HARPOLE,

ROBERT D. SCOTT and

JAMES D. PETTUS,

Special Attorneys,

Bureau of Internal Revenue,

By /s/ EUGENE HARPOLE,

Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed April 21, 1949.

In the United States District Court, Southern
District of California, Central Division
No. 8685-Y

PACIFIC MAGNESIUM, INC. (formerly Socal
Magnesium, Inc.),
Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as
Collector of Internal Revenue for the Sixth
District of California,
Defendant.

Appearances

For the Plaintiff:

MELVIN D. WILSON,
Los Angeles, California.

For the Defendant:

JAMES M. CARTER,
United States Attorney,
E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U. S. Attorneys,
EUGENE HARPOLE,
ROBERT D. SCOTT and
JAMES B. PETTUS,
Special Attorneys,
Bureau of Internal Revenue,
All of Los Angeles, California.

Yankwich, District Judge:

OPINION

Prior to November 20, 1944, P. H. Sheedy was

sole stockholder of Pacific Magnesium, Inc., the plaintiff, then known as Socal Magnesium, Inc., under certificates issued to him in his own name, as trustee and to another corporation of which he was sole stockholder. He was also the sole stockholder, either in his own name or as beneficiary under a trust, of Socal Foundry, to be referred to as Socal. Throughout the year 1944, Sheedy was president and director of both corporations. Frank Gaines had, prior to June, 1944, been an officer, director and general manager of both corporations. On November 20, 1944, he was not an officer or director of either. On November 20, 1944, an agreement was entered into by Sheedy and Gaines, by which Sheedy sold to Gaines a \$14,000.00 note of Socal, held by Sheedy, and all the Socal shares. Gaines paid \$56,000.00 in cash and promised to cause Socal Foundry to accept \$4,000.00 in settlement of a debt of \$39,335.07 owed to Socal by the plaintiff.

The Preamble of the Agreement contained the following reference to this obligation:

“Whereas, Socal Foundry claims that Socal Magnesium, Inc. is indebted to it in the approximate amount of Thirty-nine Thousand, Three Hundred Thirty-five and 07/100th Dollars (\$39,335.07), not including the amount due Socal Foundry for Socal Magnesium, Inc., herein referred to as the Permanent Mold Account in the approximate sum of Six Thousand Six Hundred Ninety and 48/100ths Dollars (\$6690.48) and not including the amount due

Socal Foundry by Socal Magnesium, Inc., known as Inventory of Metal Account, in the approximate amount of Nine Hundred Four and 40/100ths Dollars (\$904.40)''

After reciting the reciprocal undertakings of the parties, the Agreement contained this promise by Gaines as to the claim:

“(d) To cause Socal Foundry to compromise and settle its claim against Socal Magnesium, Inc. in the aforesaid amount of Thirty-nine Thousand Three Hundred Thirty-five and 07/100ths Dollars (\$39,335.07) by payment by Socal Magnesium, Inc. to Socal Foundry of the sum of Four Thousand Dollars (\$4,000) and Mr. Gaines personally agrees that he will save and hold Mr. Sheedy and Socal Magnesium, Inc., its officers, stockholders and directors wholly and completely harmless from any and all liability, claims or demands of whatever nature arising from or which may accrue to or be asserted against Socal Magnesium, Inc. by reason of said compromise and settlement of said claim;”

To carry into effect the Agreement, Gaines and his nominees were, on the same day, elected directors and officers of Socal in the place of Sheedy and his nominees.

To carry into effect the promises in the Agreement relating to the liquidation of the debt, the following Resolution was adopted by the new directorate:

“Whereas Socal Magnesium Inc., a California corporation, is indebted to this corporation in the

approximate sum of \$39,335.07, not including the amount due by said Socal Magnesium Inc. to this corporation on its Permanent Mold Account or Inventory of Metal Account, and

“Whereas it is the belief of the directors of this corporation that said Socal Magnesium Inc. is unable to pay its said debt and that if this corporation can obtain the sum of \$4000.00 from said Socal Magnesium Inc. in settlement of said debt, that it would be a wise and proper thing to do.

“Now, Therefore, Be It Resolved that this corporation accept from Socal Magnesium Inc. the sum of \$4000.00 as payment in full of all monies and other things of value that may be due and owing to this corporation from Socal Magnesium Inc., except that this does not pertain to the account known as Permanent Mold Account and the account known as Inventory of Metal Account now owing to this corporation as aforesaid.

“Resolved Further that the President and Secretary of this corporation be and they are hereby authorized and directed to execute a General Release in the name of and for and on behalf of this corporation, and to affix the corporate seal thereto, releasing said Socal Magnesium Inc. from the payment of any monies owing to this corporation, except as aforesaid, in consideration of the payment of \$4000.00 by Socal Magnesium Inc. to this corporation.”

The balance sheet of the plaintiff as of October 13, 1943, listed the debt owed to Socal in full as a liability. Its balance sheet of December 31, 1949,

showed a cancellation of the debt. The result was achieved in this manner. The plaintiff paid Socal \$4000.00 in cash, credited capital surplus with \$35,335.07, and debited a similar amount to "accounts payable Socal Foundry". In this manner, the plaintiff's excess of assets over liabilities, exclusive of the capital stock, showed an increase of \$35,335.07. Plaintiff had a clear net worth both before and after the transaction, and on December 31, 1944, showed an earned surplus of \$7,789.99. Socal deducted on its 1944 return a loss of \$35,335.07 on account of the cancellation of the debt, which the Commissioner allowed as a loss. However, because of other deductions, it derived no tax benefit from this allowance. In its income and excess profit tax return, for the year, plaintiff claimed a deduction in the amount of \$35,335.07. The Commissioner disallowed this, and on October 15, 1947, he proposed a deficiency of \$36,353.39 in excess profits tax for the calendar year 1944, claimed to be due from the plaintiff. The plaintiff paid the deficiency, with interest from March 15, 1945, amounting to \$5816.38. A timely claim for refund, filed on March 12, 1948, in the amount of \$30,487.39, with interest in the amount of \$4877.98, was denied.

By this action, the plaintiff seeks to recover the amount of such claim under Internal Revenue Code, Sec. 3772. (1)

I.

The Corporate Entity Cannot Be Disregarded

We have to determine whether, as found by the

Commissioner, the transaction resulted in taxable income under Section 22 of the Internal Revenue Code (2), or whether, as claimed by the plaintiff, the cancellation of its debt by Socal was a gift or capital contribution to the plaintiff by its sole stockholder. (3)

We advert to the fact that the Agreement, upon which the transaction is bottomed, was not entered into by either corporation. It was an agreement between Sheedy and Gaines relating to the sale and acquisition of the Socal stock which Sheedy controlled in his individual capacity or as trustee. Neither corporation, as an entity, had any stock in the other. More particularly, the plaintiff did not own any of the Socal stock which was sold to Gaines. The debt, which was adjusted, was not Sheedy's, but the plaintiff's. Socal and not Sheedy cancelled the debt, and the benefit accrued to plaintiff and not to Sheedy.

These facts are of prime importance, because the entire argument of the plaintiff seems to be predicated upon the proposition that, as Sheedy owned and controlled both corporations, there was a fusion between the individual and the corporations, the corporations, as the cases say, "were shams", the distinction between them and Sheedy should be entirely obliterated and disregarded, and whatever the corporations did, should be attributed to Sheedy, who controlled them, and vice versa. On this assumption, the plaintiff insists that the transaction amounted to "a transfer of money from one pocket of Mr. Sheedy to another".

The difficulty with the argument is that a corporation and its stockholders are distinct entities. And the taxpayer who has chosen to use the corporate form for business purposes is not free to disregard it, in order to receive the tax benefit to which he might have been entitled as an individual. The reason is obvious. Having cloaked himself in corporate garb, he cannot shed the cloak at will, in order to claim tax benefits to which he is not entitled in his corporate capacity. Otherwise put, a person who has chosen whatever benefit comes from the corporate form, must be ready to accept both the tax advantages and disadvantages which flow from it. (4) In extraordinary circumstances, the corporate entity may be disregarded, especially when the corporation has no life of its own and is merely a limited instrument to achieve a single, definite object. But this will not be done in the ordinary circumstances, where the corporation has a distinct being, in order to give to it a tax benefit from a transaction in which it did not participate in its corporate capacity. And this is especially true when, as here, and regardless of sole ownership of its stock, the business actually had been carried on under the corporate form. As said by the Supreme Court:

“The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator’s personal

or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity.” (5)

The distinction between Sheedy, the individual and controlling stockholder of the two corporations, and the corporate entities, is evident in the very contract from which the controversy stemmed. Change of liabilities was to follow the transfer of stock in Socal. After their assumption by the new directorate, there is, in the contract between Sheedy and Gaines, a distinct undertaking to save harmless not only Sheedy as an individual, but the plaintiff as well, “from any and all liability, claims or demands of whatsoever nature” which might arise from the various transfers including those “by reason of said compromise and settlement of said claim”. And, at the very time that Sheedy was selling his stock, he held a \$14,000.00 promissory note of Socal’s, payable to him. The Preamble to the contract recited that Socal was indebted to Sheedy in that sum, as evidenced by a promissory note dated March 3, 1944. By the Agreement, the note was transferred to Gaines, without recourse, its value was made a part of the consideration for the purchase of the stock, and Sheedy acknowledged receipt of its face value.

Can the transaction be considered a gift or a capital contribution?

II.

Gift or Contribution?

It is of the essence of any gift that there be no consideration. (6) And this principle applies to gifts by its stockholders to a corporation, whether they consist of the forgiveness of a debt or outright donations of things of value. If the problem of gifts between a stockholder and a corporation presents difficulties, they arise from the complexity of modern business methods and the variety of relationships into which stockholders and corporations may enter. But, whether the stockholder cancel a note or forgive a debt for services rendered or goods sold to the corporation, there must be a definite and gratuitous forgiveness by the stockholder of a definite debt which is owed to him by the corporation. (7) Where there is a reduction of a claim or its liquidation in an amount less than its face value, this principle does not apply. For, whether the adjustment be made through repurchase of an outstanding obligation for less than it cost or obligated the corporation or the satisfaction of an indebtedness for less than its value, we have the compromise of a claim and the gain resulting from it is income. (8)

III.

The Gain Was Taxable as Income

If the facts in the case be gauged by the principles just stated, it is abundantly clear that the transaction under consideration cannot be consid-

ered either a gift under Section 22(b)(3) of the Internal Revenue Code (9) or a capital contribution made gratuitously by a stockholder under the regulations. (10) As already appears, Socal was not a stockholder of the plaintiff. If any cancellation there was, it was by Socal and not by Sheedy. In truth, what we have here is not a gift or a gratuitous forgiveness, but a settlement of a claim for a less amount. The Agreement which preceded the actual cancellation and the entries made in the books and corporate records of the two corporations speak of the debt from the plaintiff to Socal not as a definite obligation, but an assertion of a claim. This indicates that the amount was not certain, that it was a matter of dispute between the two corporations. Gaines undertook to cause Socal to "compromise and settle" its claim against the plaintiff by the payment by the plaintiff of the sum of \$4000.00. As already appears, Gaines agreed to save not only Sheedy, but the plaintiff and its officers, stockholders and directors harmless from any and all liability, claims and demands which might arise or be asserted against it "by reason of said compromise and settlement of said claim". Both under general law and the law of California, the situation shows the assertion of a claim by Socal, which is disputed by the plaintiff, and a compromise of it,—a good illustration of an accord and satisfaction. (11) The actions of both corporations following the execution of the contract fit into the idea of compromise of a claim. Plaintiff cannot disclaim for

itself or Sheedy what Socal did after the Agreement was entered into, for the subsequent acts were necessary in order to protect the plaintiff and Sheedy and to give effect to the undertaking made by Gaines. The recital in Socal's Resolution accepting the four thousand dollars in payment of the debt and authorizing its President and Secretary to execute a general release merely carried out mutual promises of Sheedy and Gaines without which the Agreement would not have been made. The subsequent act of Socal in reporting this amount as a loss, which was allowed by the Commissioner, also fits into this pattern. They all spell clearly the compromise of a debt by the acceptance of a smaller sum.

In all cases of this character, the contemporaneous acts of the parties performed at the time when the effect of the transaction on tax liability was not uppermost in their minds should prevail over subsequent attempts to give to it a different interpretation. (12) If, as plaintiff contends, the effect of the transaction is as though the \$35,335.07 had been added to the price demanded by Sheedy for the transfer of the stock, and, after receiving it, Sheedy had donated it to the plaintiff, the answer is that the transaction was not handled in that manner. And neither Sheedy nor Gaines, contemporaneously, treated it as such. But even if we assume that this was the intention, their actions evidence a contrary intention. And, as between the

two, in a matter of this character, acts speak more eloquently to a court.

It follows that the Commissioner was right in his determination. Judgment will, therefore, be for the Defendant that the plaintiff take nothing by the Complaint.

Dated this 18th day of October, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

Notes to Text

1. 26 U.S.C.A., Sec. 3773.
2. 26 U.S.C.A., Sec. 22(a).
3. 26 U.S.C.A., Sec. 22(b)(3). Regulation 111, Sec. 29.22(a)-13.
4. *Klein v. Board of Supervisors*, 1930, 282 U.S. 19, 24; *New Colonial Co. v. Helvering*, 1934, 292 U.S. 435, 442; *Burnett v. Commonwealth Improvement Co.*, 1932, 287 U.S. 415, 419-420; see, *National Carbide Corp. v. Commissioner*, 1949, 336 U.S. 422, 428-429.

“A taxpayer is free to adopt such organization for his affairs as he may choose and, having elected to do some business as a corporation, he must accept the tax disadvantages.

“On the other hand, the Government may not be required to acquiesce in the taxpayer’s election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the form employed for doing business or carrying out the

challenged tax event is unreal or a sham, may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute. To hold otherwise would permit the schemes of taxpayers to supersede legislation in the determination of the time and manner of taxation. It is command of income and its benefits which marks the real owner of property.” *Higgins v. Smith*, 1940, 308 U.S. 473, 477-478.

5. *Moline Properties v. Commissioner*, 1943, 319 U.S. 436, 438-439.

“The decisive question is whether the corporations were created to, or did, in fact, serve a recognizable business purpose.” *O’Neill v. Commissioner*, 1948, C.A. 2, 170 F(2) 596, 598.

“If the corporate device is used for business advantages, there is no just ground for protests when it results in tax liability”. *Railway Express Agency v. Commissioner*, 1948, C.A. 2, 169 F(2) 193, 196.

And see, *Rogan v. Starr Piano Co.*, 1943, C.A. 9, 139 F(2) 671, 674.

6. *Roberts v. Commissioner*, 1949, 176 F(2) 221, 223.

7. 1 *Mertens, Law of Federal Income Taxation*, 1942, Secs. 5.13-5.14; 2 *Mertens, op. cit.*, Secs. 11.19-11.21; *Douglass v. Willcuts*, 1935, 296 U.S. 1, 9; *Helvering v. American Dental Co.*, 1943, 318 U.S. 322; *American Cigar Co. v. Commissioner*, 1933, C.A. 2, 66 F(2) 425; *Commissioner v. Auto Strop Safety Razor Company*, 1934, C.A. 2, 74 F(2) 226; *Gibson v. Commissioner*, 1936, C.A. 3, 83 F(2) 869;

Carroll-McReary Co. v. Commissioner, 1941, C.A. 124 F(2) 303; Chenango Textile Corp. v. Commissioner, 1945, C.A. 2, 148 F(2) 296; George Hall Corp. v. Shaughnessy, 1946, D.C. N.Y., 67 F. Supp. 746. But even a stockholder's promise not to collect on a note may be taxable if the amount of the note is transferred to the capital of the corporation and made available for distribution to stockholders. Schweppe v. Commissioner, 1948, C.A. 9, 168 F(2) 284.

8. Mertens, *op. cit.*, Secs. 11.20-11.21; United States v. Kirby Lumber Co., 1931, 284, U.S. 1; Commissioner v. Jacobson, 1939, 336 U.S. 28; Central Paper Co. v. Commissioner, 1946, C.A. 6, 158 F(2) 131; Commissioner v. Pittsburg & West Virginia Ry. Co., 1949, C.A. 3, 172 F(2) 1010. The reasoning of these cases finds support in Walker v. Commissioner, 1937, C.A. 5, 88 F(2) 170; Helvering v. Jane Holding Co., 1940, C.A. 8, 109 F(2) 933, 940-941; Walsh Holyoke Steam Boiler Works v. Commissioner, 1947, 160 F(2) 185, 189.

9. 26 U.S.C.A., Sec. 22(b)(3).

10. Regulation 111, Sec. 29.22(a)-13.

11. 1 Am. Jur., Accord and Satisfaction, Secs. 1, 2, 13; 1 C.J.S., Accord and Satisfaction, Secs. 1, 6; Restatement, Contracts, Sec. 418; Fleming v. Post, 1944, C.A. 2, 146 F(2) 441, 443; California Civil Code, Secs. 1521, 1523; Sierra, *etc.*, Power Co. v. University, *etc.*, Co., 1925, 197 C. 376, 386-387;

Hurley v. Kazantzis, 1947, 82 C.A.(2) 378, 381;
Gibbons v. Brewster, 1947, 82 C.A.(2) 435, 441-442.
The Agreement having been fully executed, it was
irrevocable, even if it had not been in writing. See,
Julian v. Gold, 1931, 214 C. 74; Stoltenberg v. Har-
veston, 1934, 1 C(2) 264, 266.

12. Cf. Grace Bros. v. Commissioner, 1949, C.A.
9, 173 F(2) 70.

[Endorsed]: Filed October 18, 1949.

[Title of District Court and Cause.]

ORDER ON DECISION

The above-entitled cause, heretofore tried, argued
and submitted, is now decided as follows:

Upon the grounds stated in the Opinion filed
herewith, Judgment will be for the Defendant that
the Plaintiff take nothing by the Complaint.

Findings and Judgment to be prepared by Coun-
sel for the Defendant under Local Rule 7.

Dated this 18th day of October, 1949.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed October 18, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Action Came On for trial on September 27, 1949, at Los Angeles, California, before the court sitting without a jury, the Honorable Leon R. Yankwich presiding; the plaintiff appeared by his attorney, Melvin D. Wilson, and the defendant appeared by his attorneys, James M. Carter, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District; Eugene Harpole, Robert D. Scott and James D. Pettus, Special Attorneys for the Bureau of Internal Revenue; briefs having been filed, a Stipulation of Facts was filed and testimony taken; thereafter on October 6, 1949, oral argument was heard, the plaintiff appearing by its attorneys Melvin D. Wilson and Frank Doherty, and defendant by his counsel; and the Court having considered the evidence and the arguments of counsel, makes the following:

Findings of Fact

I.

The facts stipulated by the parties on September 27, 1949, are hereby found and adopted by the Court as true.

II.

Plaintiff was solvent and had a clear net worth

both before and after November 20, 1944, on which date Socal Foundry's directors by a corporate resolution authorized settlement of plaintiff's debt of \$39,335.07 for \$4,000 to be paid by the plaintiff.

III.

The transaction between plaintiff and Socal Foundry which took place on November 20, 1944, was effected with the purpose of compromising the debt owed by plaintiff to Socal Foundry for less than Socal Foundry was entitled to receive; Socal Foundry had no intention of gratuitously forgiving such debt or any part of it.

IV.

The \$4,000 paid Socal Foundry by plaintiff was intended to be in satisfaction of an accord between plaintiff and Socal Foundry with respect to the debt of \$39,335.07 owed Socal Foundry by plaintiff.

V.

Socal Foundry was not a stockholder of plaintiff at the time Socal Foundry accepted \$4,000 from the plaintiff in payment of a debt in the amount of \$39,335.07.

From the foregoing Findings of Fact, the Court reaches the following:

Conclusions of Law

I.

Plaintiff in settling its indebtedness to Socal Foundry in the amount of \$39,335.07 by a payment on November 20, 1944, in the amount of \$4,000, real-

ized income under Section 22(a) of the Internal Revenue Code during the taxable year of 1944 in the amount of \$35,335.07.

II.

Said income of \$35,335.07 is not includible in plaintiff's equity invested capital during the taxable year 1944 under the provisions of Section 718 of the Internal Revenue Code.

III.

Plaintiff did not overpay its excess profits tax liability for the taxable year 1944.

IV.

Plaintiff is not entitled to recover from the defendant any part of the Federal excess profits taxes paid by it to the defendant for the taxable year 1944, nor to recover judgment against the defendant on account of said payment.

V.

That the defendant is entitled to have judgment from the plaintiff for his costs herein to be taxed by the Clerk of this Court.

Dated: This 31st day of October, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

Approved as to Form:

/s/ MELVIN D. WILSON,
Attorney for Plaintiff.

[Endorsed]: Filed October 31, 1949.

In the United States District Court, Southern
District of California, Central Division
No. 8685-Y

PACIFIC MAGNESIUM, INC. (formerly Socal
Magnesium, Inc.),

Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as
Collector of Internal Revenue for the Sixth
Collection District of California,

Defendant.

JUDGMENT

This Action Came On for trial on September 27, 1949, at Los Angeles, California, before the court sitting without a jury, the Honorable Leon R. Yankwich presiding; the plaintiff appeared by his attorney Melvin D. Wilson, and the defendant appeared by his attorneys James M. Carter, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District; Eugene Harpole, Robert D. Scott and James D. Pettus, Special Attorneys for the Bureau of Internal Revenue; briefs having been filed, a Stipulation of Facts was filed and testimony taken; thereafter on October 6, 1949, oral argument was heard, the plaintiff appearing by its attorneys Melvin D. Wilson and Frank Doherty, and defendant by his counsel; and

the Court having made its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Ordered, Adjudged and Decreed:

That the plaintiff take nothing by this action and that the defendant have and recover judgment from the plaintiff for its costs taxed by the Clerk of this Court in the sum of \$.....

Dated: This 31st day of October, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

Approved as to Form:

/s/ MELVIN D. WILSON,
Attorney for Plaintiff.

[Endorsed]: Filed and entered October 31, 1949.

[Title of District Court and Cause.]

CONDENSATION OF THE TESTIMONY
OF RALPH D. SWEENEY

RALPH D. SWEENEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

My name is Ralph D. Sweeney. I am an Attorney at Law. My address is 842 Title Insurance Building, 433 South Spring Street, Los Angeles, California.

I knew P. H. Sheedy in his lifetime. I acted as

his attorney for certain things. I was his attorney on November 20, 1944.

I was attorney for a corporation called Socal Foundry on November 20, 1944. I was also a director of that company at that time.

I was attorney on November 20, 1944, for Pacific Magnesium, Inc., then called Socal Magnesium, Inc.

I prepared the contract which is Exhibit No. 1 of the Stipulation filed in this case. Before preparing that contract I discussed with Mr. Sheedy the matter of his entering into the contract with Mr. Frank Gaines so that I am familiar with the provisions in the agreement that Mr. Gaines would cause Socal Foundry to forgive the debt of \$39,335.07 owing by Pacific Magnesium, Inc., to Socal Foundry, for the amount of \$4,000.00.

Q. Did Mr. Sheedy state to you his motive or purpose or object in that provision?

A. Yes, he did.

Q. And what did he say?

Mr. Scott (Attorney for the Defendant): If the Court please, I would like to urge an objection to that question. Our position is that the specific intent, which is material here, is the intent of Socal Foundry that was the creditor and what their intentions were in cancelling the indebtedness is material, but the intent of Mr. Sheedy was not.

The Court: Objection overruled.

The Witness: In order to answer that question, I have to give a little of the background.

Mr. Wilson: Go ahead.

The Court: That would be better. It is preferable.

Ralph D. Sweeney then testified that P. H. Sheedy had formed the corporation known as Socal Foundry and had also formed the corporation known as Socal Magnesium (now Pacific Magnesium, Inc.). Socal Foundry made aluminum castings and Socal Magnesium made magnesium castings. Mr. Sheedy was ill. He wished to dispose of his stock in Socal Foundry but wished to retain his stock in Socal Magnesium.

Mr. Frank Gaines had been a former employee of Socal Foundry and Socal Magnesium, but on November 20, 1944, was no longer employed by either company.

Mr. Sheedy and Mr. Gaines carried on negotiations toward the purchase of Mr. Sheedy's stock in Socal Foundry. Mr. Gaines had only so much cash which, according to my recollection was \$56,000.00.

Socal Foundry owed Mr. Sheedy \$14,000.00 and had executed a promissory note payable to Mr. Sheedy for that amount, which Mr. Gaines purchased in the transaction, and also Mr. Gaines paid Mr. Sheedy \$42,000.00 in cash, the consideration being that all of the stock of Socal Foundry would be transferred by Mr. Sheedy to Mr. Gaines. Socal Magnesium owed Socal Foundry approximately \$40,000.00 and Mr. Sheedy told me that he did not wish to transfer all of his stock holdings in Socal Foundry to Mr. Gaines and then have Mr. Gaines sue Socal Magnesium for the \$40,000.00 it owed and

thereby Mr. Sheedy would probably lose Socal Magnesium or would be obliged to pay more money into Socal Magnesium. Therefore, part of the transaction of November 20, 1944, was that the debt owing by Socal Magnesium to Socal Foundry would be released for the payment of \$4,000.00 by Socal Magnesium to Socal Foundry, and that is what happened.

Q. (By Mr. Wilson): What reason did either Mr. Sheedy, as sole stockholder and president of Socal Foundry, or Mr. Gaines, as president and sole stockholder of Socal Foundry, state motivated Socal Foundry in forgiving this debt?

A. Well, in the conversation that we had in which Mr. Gaines, Mr. Sheedy and I were present, which was sometime in November of 1944, preliminary to the contract, Mr. Sheedy stated that he would not sell his stock to Mr. Gaines unless the \$40,000.00, approximate amount of money owing by Magnesium to Foundry was cancelled for \$4,000.00, because he did not wish a suit brought by Socal Foundry against Socal Magnesium for the \$40,000.00, nor did he wish to loan Socal Magnesium \$40,000.00 with which to pay off Socal Foundry, and he stated that he would not sell his stock to Mr. Gaines unless he got a considerably greater amount than the cash consideration of \$42,000.00; and part of the consideration was to be the cancellation of this \$35,335.07 debt.

Q. Did that motive or purpose transmute itself to Socal Foundry?

A. It did. If I may again give you the surrounding circumstances, I believe it was the morning that the contract was signed that the consideration passed. There were two meetings of the directors of Socal Foundry. I was a director. At the first meeting, Mr. Sheedy and other directors resigned as directors and officers, Mr. Gaines and Mr. Barker were elected directors and officers to take their places. Immediately following this meeting, another meeting was had of Socal Foundry in which I, Mr. Barker and Mr. Gaines, the sole directors, participated and in which we passed a resolution to carry out the agreement of Mr. Sheedy and Mr. Gaines.

Q. The resolution to cancel the debt was then caused by the contract, was it?

A. That is correct. It is all part of the one transaction.

Examination by the Court

In response to questions by the court Mr. Sweeney testified that prior to the sale of the stock of Socal Foundry by Sheedy to Gaines, there had been no thought of having Socal Foundry forgive or cancel part of the debt owing to it from Pacific Magnesium. The matter of the forgiveness arose solely in order to facilitate the sale of Socal Foundry stock.

Cross-Examination

Mr. Gaines and Mr. Sheedy were discussing the purchase and sale of the stock of Socal Foundry perhaps two or three weeks before November 20, 1944. There were not many offers or counteroffers

as Mr. Gaines had only so much cash and the deal resolved itself around how to put that cash to work.

The transaction that was finally concluded was discussed at two conferences prior to the execution of the agreement.

Received Copy of the above and foregoing Condensation of the Testimony of Ralph D. Sweeney.

/s/ JAMES D. PETTUS.

Attorney for Defendant.

Dated November 30, 1949.

[Endorsed]: Filed November 30, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Pacific Magnesium, Inc. (formerly Socal Magnesium, Inc.), plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 31, 1949.

/s/ MELVIN D. WILSON,

Attorney for Appellant,

Pacific Magnesium, Inc.

[Endorsed]: Filed November 30, 1949.

[Title of District Court and Cause.]

CONDITIONS OF CASH BOND

State of California,
County of Los Angeles—ss.

Melvin D. Wilson, being duly sworn deposes and says:

That he is the attorney for the plaintiff, Pacific Magnesium, Inc. in the above entitled matter.

That the cash bond of Two Hundred Fifty (\$250.00) Dollars deposited herewith is the property of the plaintiff, Pacific Magnesium, Inc. That said cash bond of Two Hundred Fifty (\$250.00) Dollars is deposited herewith as required by law and the rules of the court, and is subject to the provisions of the local rule 8-C of the District Court of the United States for the Southern District of California, Central Division.

In other words if the plaintiff does not in this case pay the costs on appeal as provided by law, then the court or the clerk hereof may in accordance with the provisions of local rule 8-C proceed against the plaintiff and said cash bond in accordance with their obligation and may ward execution thereon.

On the other hand, if the plaintiff pays the cost of the appeal, then said cash bond is to be returned to the plaintiff, also in accordance with the rules of the court.

/s/ MELVIN D. WILSON.

Subscribed and sworn to before me this 30th day of November, 1949.

[Seal] /s/ GRACE M. WHEELER,
Notary Public in and for Said County and State.

My Commission Expires July 15, 1952.

The above cash bond has been examined and is recommended for approval as provided in Rule 8.

/s/ MELVIN D. WILSON,
Attorney for Plaintiff.

[Endorsed]: Filed November 30, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED ON

Now comes the plaintiff in the above entitled case and files the following Statement of Points to be relied upon in the appeal of the above entitled case from the final judgment made by this Honorable Court on the 31st of October, 1949.

1. The Court erred in failing to find that Socal Foundry intended to and did make a gift to plaintiff of \$35,335.07 on November 20, 1944, by settling the claim of \$39,335.07 of Socal Foundry against plaintiff for \$4,000.00

2. The Court erred in failing to find that P. H. Sheedy, plaintiff's sole stockholder, made a contribution to plaintiff's capital of \$35,335.07 on November 20, 1944, by causing the creditor, Socal Foundry,

to settle plaintiff's debt of \$39,335.07 for \$4,000.00.

3. The Court erred in finding that plaintiff realized \$35,335.07 taxable income out of the transaction of November 20, 1944, wherein its debt of \$35,335.07 was forgiven.

4. The Court erred in rendering judgment for defendant on the facts found.

Wherefore, the plaintiff prays that said decree be reversed and that the United States District Court for the Southern District of California, Central Division, be ordered to enter a decree reversing the decision in said cause.

/s/ MELVIN D. WILSON,
Attorney for Plaintiff.

Received Copy of the above and foregoing Statement of Points Relied On.

Dated November 30, 1949.

/s/ JAMES D. PETTUS,
Attorney for Defendant.

[Endorsed]: Filed November 30, 1949.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS
OF RECORD ON APPEAL

To The Clerk of The United States District Court
in and for the Southern District of California,
Central Division:

Please issue a certified transcript of record in the
above entitled case on appeal to the Circuit Court
of Appeals for the Ninth Circuit, consisting of the
following:

1. Complaint.
2. Answer to Complaint.
3. Stipulation of Facts and exhibits attached
thereto or made a part thereof.
4. Copy of Claim for Refund.
5. Condensation of the Oral Testimony given at
the trial.
6. Opinion of United States District Judge Leon
R. Yankwich.
7. Special Findings as allowed by the Court.
8. The Judgment.
9. Petition for Appeal.
10. Cost Bond.
11. This Designation of Portions of Record on
Appeal.

12. Statement of Points relied on by appellant.
/s/ MELVIN D. WILSON.

To Ernest A. Tolin, United States Attorney; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys, Eugene Harpole, Robert D. Scott and James B. Pettus, Special Attorneys, Bureau of Internal Revenue:

Please take notice that the foregoing Designation of Contents of Record on Appeal is being filed fore-with in the above entitled case.

/s/ MELVIN D. WILSON,
Counsel for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 30, 1949.

PLAINTIFF'S EXHIBIT No. 1

In the District Court of the United States for the
Southern District of California, Central Di-
vision

No. 8685Y

PACIFIC MAGNESIUM, INC., (formerly Socal
Magnesium, Inc.),

Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as Col-
lector of Internal Revenue for the Sixth Dis-
trict of California.

Defendant.

STIPULATION

The above-entitled parties through their respec-

Plaintiff's Exhibit No. 1—(Continued)

tive counsel hereby stipulate that the above-entitled cause may be tried upon the following stipulation of facts together with other evidence which may be introduced at the trial not contradictory hereto.

1. On November 14, 1947, plaintiff paid to defendant, the Collector of Internal Revenue for the Sixth District of California, the Thirty-six Thousand Three Hundred Fifty-two and 39/100 Dollars (\$36,352.39) demanded by the Commissioner of Internal Revenue as additional excess profits tax for the calendar year 1944, together with interest thereon from March 15, 1945, to November 14, 1947, at six per cent (6%) per annum amounting to Five Thousand Eight Hundred Sixteen and 38/100 Dollars (\$5,816.38).

2. Plaintiff's claim for refund of excess profits tax for 1944 has not been assigned by plaintiff to anyone and is now the property of plaintiff.

3. Plaintiff had capital stock outstanding as of November 20, 1944, of a par value of Thirty-five Thousand Five Hundred Dollars (\$35,500.00), being Three Thousand Five Hundred Fifty (3,550) shares, each of the value of \$10.00. As of November 20, 1944, the stock of plaintiff was held as follows: P. H. Sheedy, Certificate No. 1 for Sixteen Hundred (1600) shares; P. H. Sheedy, Trustee, Certificate No. 5 for Four Hundred (400) shares; Pearless Pattern Company, Inc., Certificate No. 8 for One Thou-

Plaintiff's Exhibit No. 1—(Continued)

sand Two Hundred Fifty (1,250) shares; P. H. Sheedy, Certificate No. 9 for Three Hundred (300) shares; total, Three Thousand Five Hundred Fifty (3,550) shares. As of November 20, 1944, P. H. Sheedy was the sole beneficiary under the trust mentioned above and was the sole stockholder of Pearless Pattern Company, Inc. On February 28, 1945, P. H. Sheedy as Trustee, transferred the Four Hundred (400) shares of stock to P. H. Sheedy and on March 14, 1947, Pearless Pattern Company, Inc. transferred the One Thousand Two Hundred Fifty (1,250) shares to P. H. Sheedy.

4. Socal Foundry was organized under the laws of California and on November 20, 1944, had issued and outstanding Three Thousand (3,000) shares of capital stock, all of which was no par value. P. H. Sheedy individually owned Twenty-two Hundred Eighty-nine and $\frac{1}{3}$ ($2289\frac{1}{3}$) shares of said stock and as trustee owned Seven Hundred Ten and $\frac{2}{3}$ ($710\frac{2}{3}$) shares of said stock. He was the beneficiary of said trust.

5. P. H. Sheedy was president and a director of plaintiff throughout 1944. P. H. Sheedy was, until he sold the stock of Socal Foundry to Mr. Frank Gaines, the president and director of Socal Foundry.

6. Mr. Frank Gaines had prior to June 1944 been an officer, director and general manager of Socal Foundry and of plaintiff. At the time of the execution of the agreement (Exhibit 1) on November 20,

Plaintiff's Exhibit No. 1—(Continued)

1944, Frank Gaines was neither an officer nor director of plaintiff or Socal Foundry. Upon the execution of the agreement referred to herein as Exhibit 1, Mr. Gaines and his nominees, were on November 20, 1944, elected directors and officers of Socal Foundry in place of P. H. Sheedy and his nominees and thereafter adopted the resolution set out in Exhibit 3 hereof.

7. As of November 20, 1944, plaintiff owed Socal Foundry Thirty-nine Thousand Three Hundred Thirty-five and 7/100 (\$39,335.07) Dollars on open account, said amount being the balance on account of numerous transactions which occurred in 1943 and 1944 wherein Socal Foundry supplied to plaintiff supplies, services and equipment. In addition plaintiff owed Socal Foundry other sums which were not settled between them on November 20, 1944; said sums being referred to in the agreement dated November 20, 1944, between P. H. Sheedy and Frank Gaines, a copy of which agreement is attached hereto and marked Exhibit 1.

On November 20, 1944, P. H. Sheedy and Frank Gaines entered into a contract, a copy of which is attached hereto and marked Exhibit 1. The terms of this contract were completely carried out in 1944. The tools, machinery and equipment which Socal Foundry sold to plaintiff on November 20, 1944, for Two Thousand Dollars (\$2,000.00) were worth Two Thousand Dollars (\$2,000.00) as of that date.

Plaintiff's Exhibit No. 1—(Continued)

8. Attached hereto and marked Exhibit 2 is a statement showing balance sheets of plaintiff as of December 31, 1943, and December 31, 1944, as shown in the Revenue Agent's report and balance sheets of plaintiff as of October 31, 1944, and December 31, 1944, per its books. It is agreed that plaintiff does not by stipulating into evidence Exhibit 2, concede that the cancellation of the debt by Socal Foundry, in the amount of Thirty-five Thousand Three Hundred Thirty-five and 7/100 Dollars (\$35,335.07) amounted to taxable income to plaintiff, and that the defendant does not by introducing to evidence Exhibit 2 concede that plaintiff did not realize taxable income on account of the forgiveness by Socal Foundry of plaintiff's indebtedness.

9. It is agreed that the plaintiff, on its books, credited the forgiveness of indebtedness in the amount of Thirty-five Thousand Three Hundred Thirty-five and 7/100 Dollars (\$35,335.07) to "Capital Surplus," and debited the amount of Thirty-five Thousand Three Hundred Thirty-five and 7/100 Dollars (\$35,335.07) to "Accounts Payable, Socal Foundry."

10. It is stipulated that both Socal Foundry and plaintiff kept their books and filed their income and excess profits tax returns on the accrual basis.

11. Attached hereto and marked Exhibit 3 is a copy of the Minutes of the Meeting of the Board of Directors of Socal Foundry held November 20, 1944,

Plaintiff's Exhibit No. 1—(Continued)

attended by Directors, Gaines, Barker and Sweeney, after the execution of the agreement marked Exhibit 1.

12. Attached hereto and marked Exhibits 4 and 5 are photostatic copies of Income and Excess Profits Tax Returns of plaintiff. It is stipulated that the penciled notes appearing on said returns are to be ignored.

13. It is stipulated that Socal Foundry deducted, on its 1944 Federal income and excess profits tax returns, a loss of Thirty Five Thousand Three Hundred Thirty-five and 07/100 Dollars (\$35,335.07) on account of the cancellation of the debt owing from plaintiff, and such deduction was allowed by the Commissioner of Internal Revenue, through his Revenue agents. It is further stipulated that Socal Foundry had a loss for 1944, after the allowance of net operating loss carry-backs, as permitted under the provisions of Section 23 (t) and 122 of the Internal Revenue Code, but before the allowance of said Thirty-Five Thousand Three Hundred Thirty-five and 07/100 Dollars (\$35,335.07) deduction, so that Socal Foundry obtained no tax benefit by reason of such Thirty-Five Thousand Three Hundred Thirty-five and 07/100 Dollar (\$35,335.07) deduction.

14. It is stipulated and agreed that after the court announces its decision on the merits, the par-

Plaintiff's Exhibit No. 1—(Continued)
ties will present computations of the tax and if there is any difference between them, it will be settled by the court.

Dated this 7th day of September, 1949.

/s/ MELVIN D. WILSON,
Attorney for Plaintiff.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE,
ROBERT D. SCOTT and
JAMES B. PETTUS,
Special Attorneys, Bureau of
Internal Revenue.

By /s/ ROBERT D. SCOTT,
Attorneys for Defendant.

Exhibit 1
(Copy)

Agreement

This Agreement made and entered into this 20th day of November, 1944, by and between

P. H. Sheedy, hereinafter referred to as "Mr.

Plaintiff's Exhibit No. 1—(Continued)

Sheedy'' and Frank Gaines, hereinafter referred to as ''Mr. Gaines''

Witnesseth:

Whereas, Socal Foundry is a California corporation and has issued and outstanding three thousand (3000) shares of its capital stock all of which is of no par value, twenty-two hundred eighty-nine and one-third ($2289\frac{1}{3}$) shares of which are owned by Mr Sheedy individually and seven hundred ten and two-thirds ($710\frac{2}{3}$) shares of which are owned by Mr. Sheedy as Trustee; and

Whereas, Mr. Sheedy either individually or as Trustee owns all of the issued and outstanding capital stock of Socal Magnesium Inc., a California corporation; and

Whereas, Mr. Gaines has been an officer, director and general manager of said Socal Foundry; and

Whereas, Socal Foundry is indebted to Mr. Sheedy in the sum of Fourteen Thousand Dollars (\$14,000.00) as evidenced by that certain promissory note of Socal Foundry payable to Mr. Sheedy dated March 3, 1944; and

Whereas, Mr. Gaines has been an officer and director of Socal Magnesium Inc. and during his term of office he caused Socal Magnesium Inc. to employ one A. V. Trotter at a monthly salary of One Thousand Dollars (\$1000.00) for a period of one year commencing September 1, 1943 and ending August 31, 1944, under a written employment agreement; and

Whereas, Mr. Gaines as an officer of Socal Mag-

Plaintiff's Exhibit No. 1—(Continued)

nesium Inc. discharged said A. V. Trotter before the termination of his contract of employment and by reason thereof said A. V. Trotter is threatening to sue said Socal Magnesium Inc.; and

Whereas, Socal Foundry claims that Socal Magnesium Inc. is indebted to it in the approximate amount of Thirty-nine Thousand Three Hundred Thirty-five and 07/100ths Dollars (\$39,335.07), not including the amount due Socal Foundry by reason of subcontracting work done by Socal Foundry for Socal Magnesium Inc. herein referred to as the Permanent Mold Account in the approximate sum of Six Thousand Six Hundred Ninety and 48/100ths Dollars (\$6690.48) and not including the amount due Socal Foundry by Socal Magnesium Inc. known as Inventory of Metal Account, in the approximate amount of Nine Hundred Four and 40/100ths Dollars (\$904.40).

Now Therefore, It Is Hereby Agreed By And Between The Parties Hereto As Follows:

1. In consideration of the covenants and agreements on the part of Mr. Gaines to be performed and of the terms, covenants and conditions herein set forth, Mr. Sheedy agrees to sell, assign, transfer and set over, without recourse, to Mr. Gaines, the aforesaid promissory note dated March 3, 1944 and executed by Socal Foundry for the sum of Fourteen Thousand Dollars (\$14,000.00), and the aforesaid three thousand (3000) shares of the capital stock of Socal Foundry for the sum of Forty-two Thousand Dollars (\$42,000.00), and in consideration

Plaintiff's Exhibit No. 1—(Continued)

therefor Mr. Gaines covenants and agrees as follows:

(a) To pay to Mr. Sheedy the said sum of Fourteen Thousand Dollars (\$14,000.00) for said promissory note, receipt of which is hereby acknowledged by Mr. Sheedy, and

(b) To pay to Mr. Sheedy the sum of Forty-two Thousand Dollars (\$42,000.), receipt of which is hereby acknowledged by Mr. Sheedy, and

(c) To immediately cause said Socal Foundry to sell to said Socal Magnesium Inc. certain tools, machinery and equipment for the sum of Two Thousand Dollars (\$2000.00) which are now owned by Socal Foundry but are in possession of Socal Magnesium Inc. and to personally warrant, guarantee and defend the title of Socal Magnesium Inc. thereto against the claims and demands of all persons whomsoever by reason of said sale, and

(d) To cause said Socal Foundry to compromise and settle its claim against Socal Magnesium Inc. in the aforesaid amount of Thirty-nine Thousand Three Hundred Thirty-five and 07/100ths Dollars (\$39,335.07) by payment by Socal Magnesium Inc. to Socal Foundry of the sum of Four Thousand Dollars (\$4,000.00), and Mr. Gaines personally agrees that he will save and hold Mr. Sheedy and Socal Magnesium Inc., its officers, stockholders and directors wholly and completely harmless from any and all liability, claims or demands of whatsoever nature arising from or which may accrue to or be asserted against Socal Magnesium Inc. by reason

Plaintiff's Exhibit No. 1—(Continued)
of said compromise and settlement of said claim;
and

(e) To save and hold Mr. Sheedy and Socal Magnesium Inc. wholly and completely harmless from any and all liability, claims or demands of whatsoever nature arising from or which may accrue to or be asserted against Socal Magnesium Inc. or Mr. Sheedy by said A. V. Trotter.

(f) To save and hold Mr. Sheedy wholly and completely harmless from any and all liability, claims or demands of whatsoever nature, suit or suits, cause or causes of action, which may be liabilities of Socal Foundry, or which may accrue to or be asserted against said Socal Foundry, or against Mr. Sheedy by reason of his stock ownership therein, by any person, firm, corporation, United States Government, or any political subdivision thereof.

2. Mr. Gaines acknowledges that he has been given full opportunity to inspect the books and records of Socal Foundry and that no warranties or representations, expressed or implied, of any kind or nature have been made by Mr. Sheedy, or any one in his behalf, concerning the liability, debts and claims of and against said Socal Foundry or concerning any of its assets, and that Mr. Sheedy does not make any warranties, guarantees or representations as to the accuracy of the books and records of Socal Foundry or that there are any outstanding claims contingent or otherwise that may be asserted

Plaintiff's Exhibit No. 1—(Continued)

against said Socal Foundry and which are not reflected on the books of said corporation, and Mr. Gaines hereby releases and forever discharges Mr. Sheedy, his heirs, executor and administrator from all claims and demands of whatsoever nature in law or in equity which against Mr. Sheedy, his heirs, executor and administrator and each of them, Mr. Gaines ever had, now has, or hereafter can or may have by reason of any dealings or transactions of any kind or nature including this transaction.

3. In connection with the agreements herein contained of Mr. Gaines to hold Mr. Sheedy wholly and completely harmless from the liabilities set forth herein, Mr. Gaines agrees that he will defend or cause to be defended any and all litigation which may arise or hereafter be asserted against Socal Magnesium, Inc., or against Mr. Sheedy, his heirs, executor and administrator arising out of any of the matters hereinbefore set forth, and that he will make defense to such litigation and all of the same through such counsel as he may select and who may be satisfactory to Mr. Sheedy, his heirs, executor and administrator. Mr. Gaines hereby further agrees that in the event of any failure on his part so to defend any and all such litigation that he will save and hold Socal Magnesium, Inc., and Mr. Sheedy, his heirs, administrator and executor, wholly and completely harmless from any and all liability which Socal Magnesium, Inc., and/or Mr. Sheedy, his heirs, executor and administrator, and each of them, may incur for attorneys fees, costs

Plaintiff's Exhibit No. 1—(Continued)

and/or expenses of any kind in defense of any such litigation or matters. Nothing in this paragraph 3 contained shall be construed to limit the liability of Mr. Gaines from saving and holding Mr. Sheedy and Socal Magnesium, Inc., wholly and completely harmless from liability arising out of any of the matters hereinabove set forth.

4. Any covenants, agreements and guarantees herein contained on the part of Mr. Gaines shall be deemed and construed to be continuing covenants, agreements and guarantees that shall survive the delivery of said shares of stock and said note.

5. Mr. Sheedy agrees that he will resign as an officer and director of Socal Foundry when requested by Mr. Gaines to do so, and it is agreed that Mr. Sheedy shall receive his usual salary from Socal Foundry up to the time of his resignation.

6. Notwithstanding anything to the contrary herein contained, it is expressly agreed and understood that Mr. Gaines is not responsible or liable for the payment of any state or federal income taxes or any taxes of whatsoever nature that may be asserted against or claimed to be due from Mr. Sheedy or Socal Magnesium, Inc., by reason of any transaction, matter, cause or thing herein set forth, or otherwise, nor shall Mr. Gaines be obligated to defend any suit or claim arising from such asserted tax liability; provided, however, that the provisions of this paragraph 6 shall in no wise pertain to income, franchise, excess profit, or other taxes of

Plaintiff's Exhibit No. 1—(Continued)

any kind or nature which may be due by or be asserted against Socal Foundry by any taxing authority, which tax liabilities are those of Socal Foundry and not of Mr. Sheedy.

7. It is further agreed and understood that this agreement is binding upon and shall inure to the benefit of the parties hereto, their heirs, executors, administrators and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

/s/ P. H. SHEEDY,

/s/ FRANK GAINES.

Plaintiff's Exhibit No. 1—(Continued)

EXHIBIT 2

Pacific Magnesium, Inc.

Balance Sheets

	Per Revenue Agent		Per Books	Per Books
	12-31-43	12-31-44	10-31-44	12-31-44
Cash	2,117.26	22,871.66	18,278.01	22,871.66
Accts. Receivable	4,132.77	60,290.42	57,918.80	60,290.42
Inventories	7,130.63	17,638.87	10,306.97	17,638.87
Depreciable Assets— net	19,642.18	21,824.67	17,216.04	20,153.03
Deposits	1,850.00	1,854.00	1,854.00	
Deferred Charges	6,869.28	4,896.90	4,606.04	6,750.90
Total	<u>\$41,742.12</u>	<u>\$129,376.52</u>	<u>\$110,179.86</u>	<u>\$127,704.88</u>
Accts. Payable	56,750.60	30,857.85	31,770.56	30,857.85
Accrued Wages	1,374.33	6,956.28	6,189.33	6,956.28
Accrued Capital stock tax	750.00	1,375.00		
Social Security and Withholding Tax	4,572.93	5,951.78	3,508.34	7,122.08
Accrued Income Tax....		39,775.32		
Accrued Compensation Insurance		1,170.30	408.91	
Capital Stock	20,000.00	35,500.00	35,500.00	35,500.00
Southern California Foundry			39,335.07	
Capital Surplus				35,335.07
Surplus	(41,704.74)	7,789.99	(6,532.35)	11,933.60
Total	<u>\$41,742.12</u>	<u>\$129,376.52</u>	<u>\$110,179.86</u>	<u>\$127,704.88</u>

Plaintiff's Exhibit No. 1—(Continued)

Exhibit 3

“Whereas Socal Magnesium Inc., a California corporation, is indebted to this corporation in the approximate sum of \$39,355.07, not including the amount due by said Socal Magnesium Inc. to this corporation on its Permanent Mold Account or Inventory of Metal Account, and

“Whereas it is the belief of the directors of this corporation that said Socal Magnesium Inc. is unable to pay its said debt and that if this corporation can obtain the sum of \$4000.00 from said Socal Magnesium Inc. in settlement of said debt, that it would be a wise and proper thing to do.

“Now, Therefore, Be It Resolved that this corporation accept from Socal Magnesium Inc. the sum of \$4000.00 as payment in full of all monies and other things of value that may be due and owing to this corporation from Socal Magnesium Inc., except that this does not pertain to the account known as Permanent Mold Account and the account known as Inventory of Metal Account now owing to this corporation as aforesaid.

“Resolved Further that the President and Secretary of this corporation be and they are hereby authorized and directed to execute a General Release in the name of and for and on behalf of this corporation, and to affix the corporate seal thereto, releasing said Socal Magnesium Inc. from the payment of any monies owing to this corporation, except as aforesaid, in consideration of the payment of \$4000.00 by Socal Magnesium Inc. to this corporation.”

Plaintiff's Exhibit No. 1—(Continued)

Pacific Magnesium, Inc.

1823 East Washington Blvd.

Los Angeles 21

March 14, 1945

So-Cal Foundry, a California corporation, had on November 20, 1944 issued and outstanding 3000 shares of its capital stock, all of which was of no par value but of a stated value of \$12.00 per share, 2289 $\frac{1}{3}$ shares of which were owned by P. H. Sheedy individually and 710 $\frac{2}{3}$ shares of which stood in the name of P. H. Sheedy as Trustee.

Pacific Magnesium, Inc. (formerly So-Cal Magnesium, Inc.) is a California corporation which on November 20, 1944 had issued and outstanding 3550 of its shares of no par stock which had a stated value of \$10.00 per share. P. H. Sheedy owned 1900 shares, P. H. Sheedy as Trustee owned 400 shares and Peerless Pattern Co., Inc. owned 1250 shares.

So-Cal Foundry on November 20, 1944 claimed that Pacific Magnesium, Inc. was indebted to it in the amount of \$39,335.07.

On November 20, 1944 Frank E. Gaines purchased from Mr. Sheedy individually and as trustee all of the aforesaid outstanding stock of said So-Cal Foundry and on said day So-Cal Foundry, in order to compromise and settle its said claim against Pacific Magnesium, Inc. in the aforesaid amount of \$39,335.07 accepted from Pacific Magnesium, Inc. and Pacific Magnesium, Inc. paid to So-Cal Foundry the sum of \$4000.00 as satisfaction and payment in full of said claim.

Plaintiff's Exhibit No. 1—(Continued)

At the beginning of the calendar year 1944 Pacific Magnesium, Inc. was insolvent in that its liabilities exceeded its assets, and at the time of the satisfaction of said debt Pacific Magnesium, Inc. was in financial straits and was not in position to pay its debts in full.

[In pencil] So-Cal Foundry claimed a Loss from Bad Debts in the amount of \$35,335.07, due to the above compromise, on its 1944 return which was allowed.

Frank E. Gaines was the sole stock holder of the So-Cal Foundry on 11-20-44, date of compromise.

Schedule A—Other Costs
So-Cal Magnesium, Inc., Los Angeles, Calif.
Year 1944

Foundry Expenses

Small Tools	\$ 1,604.24
Supplies	47,719.59
Compensation, Liability, Fire Insurance.....	7,178.40
Gas, Heat, Water & Power.....	7,259.02
Finished Castings Purchased	1,594.39
Outside Production	17,736.38
*Miscellaneous	13,257.08
	<hr/>
	\$96,349.10

* Production Expenses: X Rays, Tests; Chem. Analysis, Patterns, Sand Blasting, Pickling, etc.

Schedule D—Loss From Sale of Property
So-Cal Magnesium, Inc., Los Angeles, Calif.
Year 1944

Loss on Sale of Two Squeezers:

Cost	\$333.13
Less: Sale Price	200.00
	<hr/>
	\$133.13
Less: Accrued Depreciation	27.75
	<hr/>
Loss	\$105.38

Plaintiff's Exhibit No. 1—(Continued)

Schedule J—Loss by Fire
 So-Cal Magnesium, Inc., Los Angeles, Calif.
 Year 1944

Cost of Repairs and Replacements to	
Heat Treat Oven.....	\$6,865.75
Less: Payment by Insurance Companies.....	6,023.91
	<hr/>
Loss	\$841.84
	<hr/> <hr/>

Explanation of Net Operating Loss Deduction
 So-Cal Magnesium, Inc., Los Angeles, Calif.
 Year 1944

Loss for Fractional Part of Year 1943, Per Return Filed	
Sales	\$19,885.31
Less: Cost of Sales.....	34,215.61
	<hr/>
Gross Loss	\$14,330.30
Compensation of Officers	9,900.00
Salaries & Wages	7,543.66
Rent	2,220.00
Repairs	1,772.09
Taxes	1,490.27
Depreciation	1,919.57
Other Deductions	1,779.85
	<hr/>
Loss Per Tax Return.....	\$40,955.74
	<hr/> <hr/>

Schedule K—Other Deductions
 So-Cal Magnesium, Inc., Los Angeles, Calif.
 Year 1944

Advertising	\$ 1,112.05
Automobile	800.02
Salesmen's Expenses	2,363.31
Compensation Insurance	48.76
Stationery, Supplies & Postage	1,866.26
Office Expense	40.49
Telegraph & Telephone	1,393.31
Dues & Subscriptions	33.00
Professional Services	1,911.54
Miscellaneous	899.94
	<hr/>
	\$10,468.68
	<hr/> <hr/>

DEFENDANT'S EXHIBIT A

United States of America
Treasury Department
Washington

May 12, 1949.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Claim for Refund of \$30,487.39 plus interest, Excess Profits Tax for 1944, (with statement and certificate of counsel attached) filed by Pacific Magnesium, Inc., (formerly So-Cal Magnesium, Inc.), La Canada, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the
Treasury:

[Seal] /s/ D. L. SIEGRIST,

Head, Records Division Income Tax Unit, Bureau
of Internal Revenue.

Certificate

I certify that an examination of the records of this office shows the following facts as to the assessment and payments of the tax.

Kind of Assmt & Period covered 1944	List IT	Year 1945	Mo.	Account No.		Paid, Abated Credited		Pd. Abt. Cr. Pd. Pd. Pd. Pd.
				Page Line	Amount Ass'd	Date	Amount	
				4100636	3,122.07	3-15-45	780.52	
						6-15-45	780.52	
						9-17-45	780.52	
						12-13-45	780.51	
1944	IT	1948	Mar	8-Spl #2-40C Int to 3-8-48	300.86 55.74	3-29-48 11-14-47	94.64 254.29 7.67	Pd. Pd. Bal.
#17--3/16/48 1944	IT	1945		9400788	None		None	
1944	IT	1948	Mar	8-Spl #2-36 C EP Int to 3-8-48	36,352.39 6,493.13	3-23-48 11-14-47	1,043.72 41,116.50	Cr Cl Pd.
					*42,845.52		685.21	130573 Balance
							*42,845.52	
					Total 46,324.19	Total	46,324.19	

[* In pencil.]

Harry C. Westover
Collector of Internal Revenue
6th District Calif.
ica

Defendant's Exhibit A—(Continued)

Defendant's Exhibit A—(Continued)
Statement Attached to Claim for Refund of Excess
Profits Tax of Pacific Magnesium, Inc. (form-
erly So-Cal Magnesium, Inc.)—Calendar Year
1944

The complete statement of the facts of this matter are set out in a protest dated March 28, 1947, filed by the taxpayer in the office of the Internal Revenue Agent in Charge at Los Angeles, California.

Briefly, it may be stated that all of the stock of taxpayer and all of the stock of So-Cal Foundry was owned directly or indirectly by P. H. Sheedy. Mr. Sheedy was President of both corporations and a Director of each.

So-Cal Foundry claimed that taxpayer owed it \$39,335.07 as well as two other items of which we are not herein further concerned.

A Mr. Frank Gaines was at that time an officer of both corporations and wished to purchase the stock of So-Cal Foundry. On November 20, 1944, Messrs. Sheedy and Gaines entered into a contract by the terms of which Mr. Gaines purchased from Mr. Sheedy all of the stock of So-Cal Foundry and a \$14,000 note owing by So-Cal Foundry to Mr. Sheedy. Mr. Gaines paid Mr. Sheedy \$42,000 for the stock and further agreed that he would cause So-Cal Foundry to compromise and settle for \$4,000 its \$39,335.07 claim against taxpayer. The terms of this contract were carried out.

The Commissioner has determined that the \$35,335.07 constituted income to taxpayer and that it

Defendant's Exhibit A—(Continued)

was not includible in taxpayer's invested capital from November 29, 1944, on, either as old or new capital.

Taxpayer takes the position that either (1) the taxpayer paid to So-Cal Foundry all that it was able to pay and has no net worth after the settlement and hence did not realize income from the settlement of the debt or (2) So-Cal Foundry intended to and did make a gift to taxpayer and consequently the settlement would not be income or (3) Mr. Sheedy, the principal stockholder of taxpayer, made a contribution to its capital. If No. 3 is the correct solution, then taxpayer would have an increase in its invested capital as new invested capital as of November 20, 1944, in the amount of \$35,335.07.

The legal effect of these transactions is argued in the protest dated March 28, 1947, filed in the office of the Revenue Agent in Charge to which reference is hereby further made.

It is believed that the Commissioner has erred in his determination that said item of cancellation of debt was income to taxpayer and has further erred in excluding it from invested capital for 1944.

Taxpayer believes that it is entitled to a refund computed by eliminating from income said item of \$35,335.07 and by including in invested capital said item November 20, 1944, on, as new capital.

We request a re-payment of the \$30,487.39 plus \$4,877.98 (interest paid) plus interest thereon from November 14, 1947, as provided by law.

Defendant's Exhibit A—(Continued)

February 21, 1948.

Certificate of Counsel

I hereby certify that I prepared the attached Claim for refund on the basis of information furnished to me by the taxpayer, which information I believe to be true, but which I do not know of my own knowledge.

/s/ MELVIN D. WILSON,

819 Title Insurance Building

Los Angeles 13, California.

Admitted September 27, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 77, inclusive, contain the original Complaint; Answer; Condensation of the Testimony of Ralph D. Sweeney; Plaintiff's Exhibit 1 (Stipulation of Fact); Defendant's Exhibit A (Claim for Refund); Opinion; Order on Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Bond on Appeal; Statement of Points Relied on; and Designation of Portions of Record on Appeal which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and

certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 20 day of December, A.D. 1949.

EDMUND L. SMITH,

Clerk.

[Seal] By /s/ THEODORE HOCKE,

Chief Deputy.

[Endorsed]: No. 12436. United States Court of Appeals for the Ninth Circuit. Pacific Magnesium, Inc., (formerly Socal Magnesium, Inc.), Appellant, vs. Harry C. Westover, individually and as Collector of Internal Revenue for the Sixth District of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 21, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
Docket No. 12436

PACIFIC MAGNESIUM, INC., (formerly Socal
Magnesium, Inc.),

Appellant,

vs.

HARRY C. WESTOVER, Collector of Internal
Revenue for the Sixth District of California,
Appellee.

STATEMENT OF THE POINTS ON WHICH
APPELLANT INTENDS TO RELY AND
DESIGNATION OF THE PARTS OF THE
RECORD NECESSARY FOR THE CON-
SIDERATION THEREOF

To the United States Court of Appeals:

The appellant hereby adopts the Statement of the Points on Which It Intends to Rely, which was filed in the District Court, as its Statement of the Points on Which It Intends to Rely in this court.

Appellant designates the entire record as being necessary for the consideration of this appeal.

/s/ MELVIN D. WILSON,
Counsel for Appellant.

The appellee, Harry C. Westover, Collector for the Sixth District of California, through his attorney, hereby accepts service of a copy of the above entitled Statement of the Points on Which Appellant Intends to Rely and Designation of the Parts

of the Record Necessary for the Consideration
Thereof.

ERNEST A. TOLIN,

U. S. Attorney,

E. H. MITCHELL,

EDWARD R. McHALE,

Assistant U. S. Attorneys,

EUGENE HARPOLE,

ROBERT D. SCOTT,

JAMES B. PETTUS,

Special Attorneys.

/s/ EUGENE HARPOLE,

Counsel for Appellee.

[Endorsed]: Filed Dec. 29, 1949.

